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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 413

HONORABLE BERNARD M. DECHER,
UNITED STATES DISTRICT JUDGE, ET AL.,
Petitioners,

vs.

HOUSTON & ROW P'SHIP, INC., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF THE AMERICAN BAR ASSOCIATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

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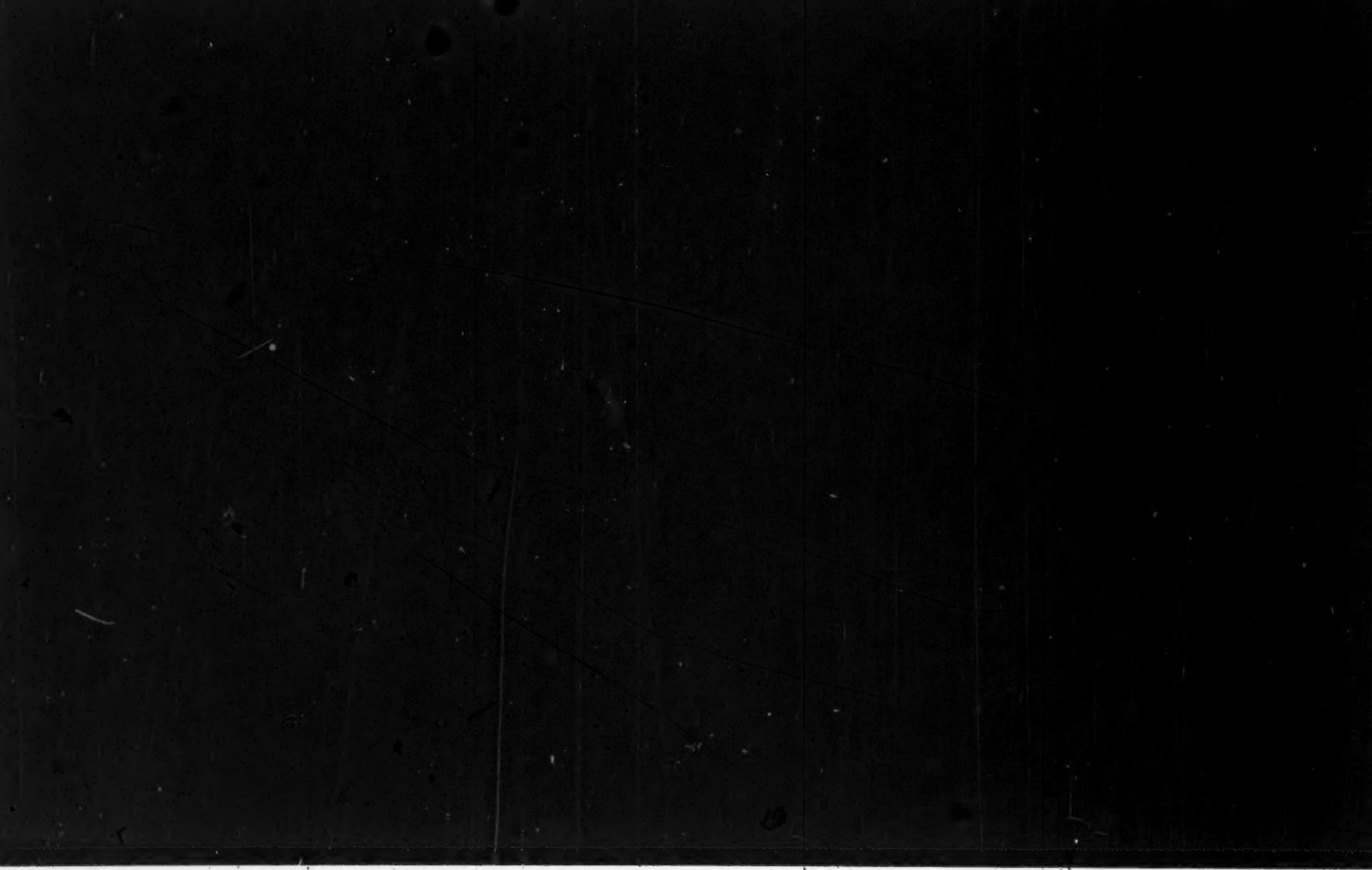

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 113

HONORABLE BERNARD M. DECKER,
UNITED STATES DISTRICT JUDGE, et al.,
Petitioners,

v.

HARPER & ROW PUBLISHERS, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF THE AMERICAN BAR ASSOCIATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

The American Bar Association respectfully moves under paragraph 3 of Rule 42 of the Supreme Court Rules for leave to file a brief as *amicus curiae* in support of the position of respondents in this cause. The written consent of all respondents has been obtained. The consent of attorneys for petitioners has been requested but has been denied.

An authoritative delineation of the scope of the attorney-client privilege available to corporate clients will be an

event of great impact on the administration of justice and the legal profession. The great bulk of business activity in this country is carried on through corporate enterprises. The policy formulated by the Court will significantly affect the future representation of corporations and the individuals who are employees of those corporations.

The American Bar Association believes that the "control group test" adopted by the trial court, and espoused by petitioners, would effectively deprive corporations of the attorney-client privilege and deleteriously affect the legal representation of corporations and individuals in their employ. It submits that the test formulated by the court of appeals fairly balances the need for the uninhibited communication with counsel with the need for freedom of discovery in litigation.

The Court's action in this cause will significantly affect the entire spectrum of corporate attorney-client relationships. Petitioners and respondents must necessarily focus on the narrow aspect of the privilege concerning them directly. Thus the American Bar Association has reason to believe that the parties will not adequately present the questions raised by the impact of the privilege in areas beyond the very limited aspect involved in this cause. The Bar wishes to present the policy considerations it believes crucial to a proper delineation of the privilege. Particularly those relating to its impact on the Fifth Amendment rights of individual corporate employees and those relating to the bar's efficacy in securing voluntary observance of the law.

The significance of this cause to the administration of justice and the bar is such that it is appropriate for the Court to hear argument from the American Bar Association.

WHEREFORE the American Bar Association prays that this motion be granted.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1970

No. 113

Honorable Bernard M. Decker,
United States District Judge, et al.,
Petitioners,

v.

Harper & Row Publishers, Inc., et al.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

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BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

OPINIONS BELOW AND JURISDICTION

Amicus adopts petitioners' statements of the opinions below and jurisdiction.

QUESTION PRESENTED

Whether the attorney-client privilege protects the confidentiality of communications between an attorney for a corporation and an employee of that corporation in situations where, in the words of the court of appeals, "the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment"?

STATEMENT OF THE CASE

Amicus adopts respondents' statement of the case.

INTEREST OF AMICUS CURIAE

Authoritative delineation of the scope of the attorney-client privilege as applied to corporations will be a determination of great import to the administration of justice and to the legal profession's role therein. Its significance will reach far beyond causes of the genre of this case. Amicus submits that acceptance of the "control group test" espoused by petitioners would substantially and adversely affect the entire spectrum of corporate attorney-client relationships. Inevitably, and properly, petitioners and respondents must focus on the facts of this particular cause. The interest of amicus is in focusing on the impact of the privilege in areas beyond the very limited aspect involved in this cause and presenting the policy considerations amicus believes crucial.

ARGUMENT

(1) The Court Of Appeals' Formulation Of the Privilege Is a Balanced and Fair One

The radical constriction of the privilege which would occur with adoption of the "control group test," would effectively deny the privilege to corporations — a result both unsound and unnecessary. Even under the test formulated by the court of appeals, application of the privilege would be extremely narrow. A corporation can claim the privilege under that test only when the eight require-

ments of Wigmore's classic formulation* are met, plus the following five additional requirements:

(1) The communicant must be an employee

(2) who communicated with the corporation's attorneys at the direction of his superiors

(3) where the subject matter upon which the attorney's advice is sought by the corporation, and

(4) dealt with in the communication,

(5) is the performance by the employee of the duties of his employment.

The court of appeals expressly avoided devising a test covering the testimony of agents interrogated as mere witnesses. App. 63a, 423 F.2d at 491-92.

Of course, an adversary can extensively depose agents as to whose communications to attorneys the corporation is entitled to claim the privilege. The ultimate facts within the knowledge of the agent are not covered by the privilege. Further, there are alternative discovery devices. For example, in this case, grand jury testimony has been made available. App. 8a-14a, 1969 CCH Trade Cas. ¶ 72,965 at 87,750-52. The vast array of mandatory corporate records, if otherwise discoverable, cannot be placed beyond the reach of an adversary by placing them in the hands of an attorney.

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* There is apparently no dispute between the parties as to the validity of Wigmore's formulation of the attorney-client privilege:

(1) Where legal advice of any kind is sought,
(2) from a professional legal adviser in his capacity as such,
(3) the communications relating to that purpose,
(4) made in confidence,
(5) by the client,
(6) are at his instance permanently protected,
(7) from disclosure by himself or by the legal adviser,
(8) except the protection be waived.

8 J. WIGMORE, EVIDENCE § 2292 at 554 (McNAUGHTON rev. 1961).

Federal district courts have been able to apply fairly in a corporate context a test far broader than the one annunciated by the court of appeals. *See United States* v. *United Shoe Machinery Corporation,* 89 F. Supp. 357 (D. Mass. 1950); *Zenith Radio Corporation* v. *RCA,* 121 F. Supp. 792 (D. Del. 1954); *American Cynamid Company* v. *Hercules Powder Company,* 211 F. Supp. 85 (D. Del. 1962). It would be a very rare cause where a party could not fairly present its case without examining the corporation's attorney or seizing his papers covering the small area protected by the corporate attorney-client privilege formulated by the court of appeals. Such cases do not merit the cost to the administration of justice that the "control group test" would exact.

(2) The Court Faces the Question Whether It Is In the Interest Of the Administration Of Justice To Deprive Corporations Of the Attorney-Client Privilege

In urging the "control group test," petitioners urge this Court in effect to deprive corporations of the attorney-client privilege in significant corporate transactions. The test limits the privilege's application to communications by corporate agents who will play a substantial role in determining how the corporation will act on the resultant advice. In creating it, Judge Kirkpatrick recognized that, in matters which are significant to the corporation, a relatively small group of corporate agents, such as the board of directors, controls what action the corporation will take. Almost inevitably, the corporate agents possessing relevant factual data are middle management or lower, operational executives. Contrary to the basic purpose of the privilege — the encouragement of uninhibited communication with attorneys as to the relevent facts — the "control group test"

is not designed to protect factual communications by the corporate agents possessing the information. It limits itself to providing partial protection for the secondary aspect of the privilege, the receipt of advice from attorneys by the control group.

The Court faces then, not a mere choice between variants of the attorney-client privilege in a corporate context, but the question whether the administration of justice would be served by effectively depriving corporations of the attorney-client privilege.

This cause itself deals only with memoranda made in anticipation of litigation — a narrow segment of the privilege's application in the corporate context. However, adoption of the "control group test" would have drastic impact over the entire range of corporate attorney-client relationships which involve almost every aspect of a corporation's daily operations. Corporate counsel would be forced to work on the assumption that all communications with non-control group personnel are discoverable. Since the size of the control group diminishes as the significance of a matter grows, the size of the group cannot be known in advance where a matter of potentially substantial significance is involved. If litigation were to arise, it might develop that the significance of the matter was such that the control group would consist of only the board of directors. Thus, corporate attorneys could not prudently rely on the attorney-client privilege in any matter which possessed the potential of becoming significant.

As we shall demonstrate, this radical revision of the attorney-client privilege would adversely affect the administration of justice in this country by impeding effective counseling of corporations and damaging the individual rights of their agents. This consequence is too high a price for

making the confidential communications available for discovery.

This availability would prove to be illusory once the new rule was adopted. If corporate counsel were forced to operate without the privilege, dishonest lawyers would simply conceal the communications; prudent lawyers would make certain that no such evidence was created. Debriefing memoranda such as those involved in this cause would simply not be made. Awkward as it would be, prudent corporate lawyers would simply not gather information that would be harmful to their corporate clients in an adversary proceeding. Because the logical consequence of the "control group test" would be cross-examination of corporate counsel, they would be forced to limit their probing for facts, lest their testimony on cross-examination form the strongest evidence in support of an attack on their client.

(3) The Attorney-Client Privilege Serves the Same Valuable Purpose Of Encouraging Uninhibited Communication In a Corporate Context As It Does For Individuals

The basic purpose of the attorney-client privilege is "that of encouraging clients to lay the facts fully before their counsel." *See* C. McCORMICK, EVIDENCE § 96 at 195 (1954). To accomplish this "the apprehension of compelled disclosure by the legal advisers must be removed." 8 J. WIGMORE, EVIDENCE § 2291 at 545 (McNaughton rev. 1961). The common law has long recognized that full and uninhibited disclosure to one's attorney is so crucial to the proper functioning of the adversary system that it must be treated as privileged even though, as with all privileges, some burden is thereby placed upon discovery processes. No lawyer can effectively advise and

represent a client without full knowledge of the client's side of the story. These considerations are as applicable in a corporate context as they are for individuals. This Court recognized the corporation's need of the privilege over fifty years ago:

> The desirability of protecting confidential communications between attorney and client as a matter of public policy is too well known and has been too often recognized by text-books and courts to need extended comment now. If such communications were required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance.

United States v. *Louisville & Nashville Railroad Company*, 236 U.S. 318, 336 (1915) (An attempt by the United States to obtain corporate files including communications between agents of the corporation and its attorneys).

Neither the need for the application of the attorney-client privilege in the corporate context nor the validity of the Court's observation that abolition of the privilege would amount to a practical prohibition on the exchange of information has been diminished since *Louisville*. Today the American corporation must exist in a great welter of regulatory statutes whose observance requires legal advice on virtually every aspect of its affairs. Every transaction involving corporate financing, its competitors, its customers, its employees or foreign trade, is governed by complex regulatory statutes which, in most instances, in addition to subjecting the corporation to severe risks, subject the corporate agents to criminal penalties. If a corporation is to comply with the law, it must have legal counsel freely available at all levels of its operations.

(4) The Corporate Attorney-Client Privilege Is An Aid To Achieving Voluntary Compliance With the Law By Corporations

As many students of jurisprudence have pointed out, the private bar is an extremely important factor in achieving voluntary compliance with the law. The prosecutorial agencies and government administrative agencies could not hope to achieve widespread compliance without the assistance of the bar. Functioning properly, the bar instructs its clientele as to the meaning of the law, alerts them to risks and pushes them toward compliance. *See* ABA Canons of Professional Ethics No. 16. For the bar to be able to perform this function, it must be free to extract from its clients full details of their conduct.

This is particularly crucial in day-to-day counseling at the lower levels of corporate management. For example, those who encounter difficulties with the antitrust laws are usually middle or lower management personnel who are actually involved in the marketing process. Prudent corporate management will provide for extensive counseling of these personnel by corporate attorneys. As members of this Court have many times observed, the application of the antitrust laws can be bewilderingly complex. The securities laws are another example. Conduct at many levels of the corporate hierarchy from field men on up can place both the corporation and the individual in jeopardy. *See, e.g., Securities and Exchange Commission* v. *Texas Gulf Sulphur Company*, 401 F. 2d 833 (2d Cir. 1968), *cert. denied sub nom., Coates* v. *Securities and Exchange Commission*, 394 U.S. 976 (1969).

A layman could not hope to evaluate the significance of factual variations and distinctions, shadings of difference between various situations. He must be free to lay his case

entirely before the corporation's lawyers — certainly in most instances he cannot be expected to afford his own counsel to advise him. Yet, under the "control group test," all of these people would be stripped of the attorney-client privilege. It would no longer be prudent for a corporation to have its lawyers carefully and regularly gather facts about its operations. The gathering of such information might be fatal in some unanticipated lawsuit. The sophisticated lawyer would not wish to learn too much. The employee would have to stumble warily along seeking to ask questions which would enlighten him as to the law, while at the same time concealing from the lawyer any evidence of what the employee guessed might be violations of the law. The lawyer would have to suppress judgments as to the uncertainty of the legality of conduct for fear that the employee might some day be forced to repeat his words before a jury. This clogged and inhibited communication would demoralize the attorney-client relationship and cripple the bar's power to counsel and guide.

(5) Recognition Of the Corporate Attorney-Client Privilege Is Essential To Protect the Individual Corporate Employee's Fifth Amendment Privilege Against Self-Incrimination

Almost inevitably when a corporation is charged with either civil or criminal violations of regulatory laws, criminal charges could be brought against individual corporate employees on the same theory underlying the complaint against the corporation. *See, e.g., United States* v. *Wise*, 370 U.S. 405 (1962); *United States* v. *Dotterweich*, 320 U.S. 277 (1943).

Refusal to recognize a reasonable corporate attorney-client privilege would be destructive of the individual's privilege against self-incrimination. All communications

by the individuals with lawyers for the corporation over the past several years would be subject to discovery by examination of the corporate counsel. Thus, by seeking advice from the corporation's attorneys on how to conduct the corporation's affairs, and making a full disclosure in doing so, the individuals would have effectively waived their Fifth Amendment privilege as to any incriminating testimony.

In cases where the corporation's counsel determined that their need to develop information after charges were brought justified the risk of discovery, it would lead to economic pressure being placed upon the individual to confide in a corporation's attorney—even though such communications would effectively amount to a waiver of the individual's privilege against self-incrimination. The individual might be forced to choose between his loyalty to his employer (his livelihood) and his Fifth Amendment rights. This Court should avoid a formulation of the privilege with this inherent vice. *Cf. Garrity* v. *New Jersey*, 385 U.S. 493 (1967); *Spevack* v. *Klein*, 385 U.S. 511 (1967); *Gardner* v. *Broderick*, 392 U.S. 273 (1968).

Clearly, those individuals who were sophisticated and affluent enough to obtain counsel of their own would be advised by those counsel simply not to discuss the matters in question with the corporate counsel. Even those witnesses who had been called before the grand jury and thereby received some degree of immunity from further prosecution (in those areas where there are applicable immunity statutes) might be advised by their counsel not to communicate with corporate attorneys. Areas might be developed that were not covered by the grand jury and as to which the corporate executives could not claim immunity because of their grand jury appearance. *See United States* v. *Zirpolo*, 288 F. Supp. 993, 1002-07 (D.N.J. 1968). *Cf.*

Malloy v. *Hogan*, 378 U.S. 1 (1964). Those who had not been called before a grand jury would simply have to refuse to make any disclosures. Even Professor Morgan, who sees the privilege as involving only a simple dichotomy between truth and lies, recognizes that: "In situations where the privilege against self-incrimination is involved, the retention of the [attorney-client] privilege is justified." Morgan, Foreword to MODEL CODE OF EVIDENCE 27 (1942). As we have discussed, almost every significant aspect of modern corporate activity involves both potential liability for the corporation and potential criminal liability for its individual agents.

(6) Recognition Of the Attorney-Client Privilege Is Essential If the Adversary System Is To Function Fairly

If a lawyer is to represent properly a corporation in the type of security, antitrust and regulatory litigation which flourishes today, he must be able to make an untrammeled factual investigation. So long as the attorney-client privilege is recognized, he can examine his clients vigorously and exhaustively. His clients, of course, do not "know" the facts, that is to say they do not appreciate the significance of such data as they recollect; their instinct is to speak in guarded half-truths concealing what they believe to be unfavorable. *See* C. McCORMICK, EVIDENCE § 91 at 181-82 & § 100 at 202 (1954). The lawyer's factual knowledge or memoranda will not reflect the "truth," but rather the mosaic he has built from the incoherent, inconsistent and flickering recollections and understandings of the agents of his client. As his understanding of the case deepens, his judgment as to the accuracy of various agents may alter; his perception of what transpired may change radically. Ultimately he will give advice based on his understanding

of the facts; if litigation ensues, he will attempt to present a coherent picture to the finder of fact which casts the facts in their most favorable light. It is, of course, the function of his adversary to marshall the facts and present them in the worst light. Neither will ever learn all the facts. It is our society's commitment, however, that justice is most likely to be achieved through forceful partisan representation by counsel.

Stripping the corporation of the attorney-client privilege, as the "control group test" would effectively do, would not lead to greater likelihood of reaching the "truth." By inhibiting corporate counsel's research, it would diminish it. It would give the corporation's adversaries powerful and unfair forensic weapons which would lessen the likelihood of just results in litigation. The remarks of Mr. Justice Jackson, joined by Mr. Justice Frankfurter, concurring in *Hickman* v. *Taylor*, illustrate the problems of making witnesses of lawyers. These considerations apply with far greater force when what is involved is communications not by mere witnesses, but by the very corporate agents alleged to have committed the acts creating the alleged liability of the corporation. Counsel for corporations' adversaries would be all the more eager to engage in the practices Justice Jackson feared and condemned:

> I can conceive of no practice more demoralizing to the Bar than to require a lawyer to write out and deliver to his adversary an account of what witnesses have told him. Even if his recollection were perfect, the statement would be his language, permeated with his inferences. Every one who has tried it knows that it is almost impossible so fairly to record the expressions and emphasis of a witness that when he testifies in the environment of the court and under the influence of the leading question there will not be departures in some respects. Whenever the testimony of the

witness would differ from the "exact" statement the lawyer had delivered, the lawyer's statement would be whipped out to impeach the witness. Counsel producing his adversary's "inexact" statement could lose nothing by saying, "Here is a contradiction, gentlemen of the jury. I do not know whether it is my adversary or his witness who is not telling the truth, but one is not." Of course, if this practice were adopted, that scene would be repeated over and over again. The lawyer who delivers such statements often would find himself branded a deceiver afraid to take the stand to support his own version of the witness's conversation with him, or else he will have to go on the stand to defend his own credibility — perhaps against that of his chief witness, or possibly even his client.

Every lawyer dislikes to take the witness stand and will do so only for grave reasons. This is partly because it is not his role; he is almost invariably a poor witness. But he steps out of professional character to do it. He regrets it; the profession discourages it. But the practice advocated here is one which would force him to be a witness, not as to what he has seen or done but as to other witnesses' stories, and not because he wants to do so but in self-defense.

And what is the lawyer to do who has interviewed one whom he believes to be a biased, lying or hostile witness to get his unfavorable statements and know what to meet? He must record and deliver such statements even though he would not vouch for the credibility of the witness by calling him. Perhaps the other side would not want to call him either, but the attorney is open to the charge of suppressing evidence at the trial if he fails to call such a hostile witness even though he never regarded him as reliable or truthful.

Hickman v. *Taylor*, 329 U.S. 495, 516-18 (1947).

As we have indicated, the unscrupulous advocate could largely avoid the threats posed by the "control group

test." He could destroy documents, fabricate testimony, etc., and gain new advantages over his conscientious adversary. The honest and prudent advocate, however, would be put in a position of limiting examinations of his own client's agents, lest he thereby build a case for his adversary, subjecting himself to cross-examination that would be devastating to his client; or effectively destroying the individual Fifth Amendment privilege of one of the corporate employees. He would no longer create factual memoranda — either to record grand jury debriefing or as a mnemonic device — unless confident he was willing to have it discovered. In sum, much of his energies in counseling would be taken by the purely negative and debilitating task of avoiding the creation of ammunition for his existing or potential adversaries.

This diminution of the factual foundation of corporate representation would impede possible settlements of causes. An attorney cannot properly evaluate a case and recommend settlement until he has the full factual picture in his hand. Yet, his development of the picture from non-control group employees would necessarily be limited and cautious. Many prudent attorneys would doubtless prefer to wait and see how much their adversaries discovered. Thus, many proceedings would be prolonged.

(7) The "Control Group Test" Is Based On a Faulty Conceptual Analysis Of the Privilege

The "control group test" was created by Judge Kirkpatrick. *City of Philadelphia* v. *Westinghouse Electric Corporation*, 210 F. Supp. 483 (E.D. Pa.), *petition for mandamus denied sub nom., General Electic Company* v. *Kirkpatrick*, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943

(1963). Nominally accepting Wigmore's formulation of the privilege, he held that it was available to corporations only if the employee making the communication to the attorney was in a position to take a substantial part in a decision about any action which the corporation might take upon advice of the attorney. 210 F. Supp. at 485. Judge Kirkpatrick's formulation was a novel and radical innovation.

As we have discussed, the "control group test" amounts to the effective deprivation of the attorney-client privilege for corporations. Judge Kirkpatrick, however, gave no articulate analysis or attention to the policy considerations involved in this drastic change in the law. None of the cluster of courts which followed Judge Kirkpatrick in adopting the test have ever given articulate consideration to the policy questions involved. *See Natta* v. *Hogan*, 392 F.2d 686 (10th Cir. 1968) (No party challenged the validity of the test); *Honeywell, Inc.* v. *Piper Aircraft Corporation*, 1970 Trade Cas. ¶ 73,122 (M.D. Pa. 1970). (The court chose the "control group test" over the court of appeals' formulation. However, it pointed out that, in any event, the party claiming the privilege had in most instances failed to make a showing which would have entitled it to the privilege under the court of appeals' formulation. 1970 Trade Cas., *supra* at 88,424 & n.1); *Garrison* v. *General Motors Corporation*, 213 F. Supp. 515 (S.D. Cal. 1963) (The corporation relied on the "control group test" as supporting its claim of privilege); *Day* v. *Illinois Power Company*, 50 Ill. App.2d 52, 199 N.E.2d 802 (5th Dist. 1964).

The preliminary draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 249-51 (March 1969) also follows the "control

group test." However, the Advisory Committee's Note merely conclusorily follows *City of Philadelphia*. *See* 46 F.R.D. at 252-53. And discussions by committee members indicate that they relied heavily on Judge Kirkpatrick without independent analysis. *See* Berger, "Discussion of the Proposed Federal Rules of Evidence: Privileges," 48 F.R.D. 39, 44, 45-46 (1969). Amicus hopes that, after the many criticisms leveled against the preliminary draft, the portion containing the "control group test" will not be adopted. *See, e.g.*, JOINT REPORT OF THE ABA SPECIAL COMMITTEE ON UNIFORM EVIDENCE RULES FOR FEDERAL COURTS AND THE ABA SPECIAL COMMITTEE ON FEDERAL RULES OF PROCEDURE (1970) (Filed by letter of Vincent L. McKusick to Honorable Albert B. Maris, Chairman, Standing Committee on Rules of Practice and Procedure, March 30, 1970), wherein the Special Committees strongly urge that Rule 5-03(a)(3) be revised to read substantially as follows:

> (3) A "representative of the client" is one (a) having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client, or (b) authorized by the client to disclose or furnish to the client's lawyer or a representative of such lawyer confidential communications, data or information.

See also, the criticisms cited in the Joint Amicus Brief of the Association of the Bar of the City of New York and the New York County Lawyers' Association at 12-14.

As we have sought to demonstrate, adoption of the "control group test" would have adverse effects on the administration of justice and would not have offsetting beneficent effects. Without attempting to balance these considera-

tions, Judge Kirkpatrick reached the "control group test" on a faulty conceptual analysis. He nominally accepted the classic formulation of the privilege in beginning his analysis. However, he then critically distorted the "basic requirement . . . that the communication must be made by the client to enable the lawyer to advise him." 210 F. Supp. at 484-85. He reasoned that under the privilege this meant that the individual making the communication had to be the individual seeking advice. Contrary to Judge Kirkpatrick's position that he was merely restating a fundamental requirement of the privilege, this requirement was a distortion of the privilege with no precedential support. It has for centuries been the rule that a communication made by a client's agent to the client's attorney falls within the scope of the privilege regardless whether the agent or client (whether individual, corporation, etc.) received the advice and acted upon it. *See* 8 J. WIGMORE, EVIDENCE § 2317 at 618 (McNaughton rev. 1961); C. McCORMICK, EVIDENCE § 100 at 204 (1954); 3 B. JONES, THE LAW OF EVIDENCE § 831 at 1560 (Gard rev. 1958); UNIFORM RULE OF EVIDENCE 26(3); MODEL CODE OF EVIDENCE rule 210(c)(ii) (1942).

While Judge Kirkpatrick's formulation is ostensibly related only to corporations, under his logic an individual (or any other entity) would automatically lose the privilege for communications made by an agent to his attorney, except where he had given his agent power to make decisions regarding the litigation. Such has never been the law.

Judge Kirkpatrick erroneously relied on *Hickman* v. *Taylor*, 329 U.S. 495 (1947) for this proposition. However, *Hickman* simply did not address itself to the question of communications by an agent regarding the performance of the duties of his employment. It involved the sinking of a

tug because of the negligent instructions issued to the tug's captain by a member of the partnership which owned it. Wrongful death claims were made by the families of a number of crew members who drowned. All of the surviving employees whose statements were sought also had claims against the tug owners. (Record in *Hickman* v. *Taylor* at 70a.) *See Hickman* v. *Taylor*, 75 F. Supp. 528, 530-31 (E.D. Pa. 1947) (Opinion on the Merits), *aff'd*, 170 F.2d 327 (3d Cir. 1948), *cert. denied*, 336 U.S. 906 (1949). These employees were properly cast in the role of adverse third parties by the parties and by every court which considered the cause. *See* Brief for Petitioner in *Hickman* v. *Taylor* at 14; 4 F.R.D. 479, 482 (E.D. Pa. 1945); 153 F.2d 212, 222 (3d Cir. 1945); 329 U.S. 495, 506 (1947). The respondents in *Hickman* could not have based a claim of privilege on the employee's agency relationship because the privilege is inapplicable where the agent is being interviewed as one whose interests are adverse to those of the principal. *Becher* v. *United States*, 5 F.2d 45, 49 (2d Cir.), *cert. denied*, 267 U.S. 602 (1924).

Further in *Hickman*, the respondents argued that *"attorneys as a class* should be 'privileged.'" Brief for Respondents at 18) (emphasis supplied). In denying that the attorneys' entire trial preparation was privileged, the Court did not have before it any claim of privilege based on an agency relationship. 329 U.S. at 508. The question whether an agent's communication at the behest of his principal regarding the performance of his duties is privileged was not before the Court. The reliance on *Hickman* by Judge Kirkpatrick, and by petitioners in this cause (Brief for Petitioners at 28) is misplaced. Thus, the "con-

trol group test" clearly is not dictated or supported by the precedential effect of *Hickman*.

Using his distorted formulation of the privilege as a premise, Judge Kirkpatrick then asked what he saw as the critical question: "In other words, was he [the corporate employee] at the time, in contemplation of law, the corporation seeking advice?" 210 F. Supp. at 485. Under Judge Kirkpatrick's formulation of the privilege where the individual communicating facts must be the same individual who will make the decision on how to act on the attorney's advice, the "control group test" mechanically follows. If the corporation is forced to act through two agents in dealing with its attorney, one to communicate the facts and another to make a decision based on the attorney's advice, it must forfeit the privilege. As we have demonstrated, however, there is no historical basis for this gloss on the privilege. Prior to Judge Kirkpatrick, no court had suggested that the mere creation of a duality between the factual source of the client's communication and the decision making power of the client caused a forfeiture of the privilege.

The conceptual inadequacy of Judge Kirkpatrick's formulation is clear. That is the sole articulated basis of his decision. He failed to analyze the policy considerations involved. We submit that *City of Philadelphia*, and its progeny following the "control group test," are not entitled to precedential respect by the Court.

CONCLUSION

The American Bar Association urges the Court to affirm the decision of the court of appeals in this cause.

Respectfully submitted,

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